

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-220

Opinion Delivered SEPTEMBER 17, 2008

MERCY HEALTH CENTER and AIG
CLAIM SERVICES, INC.,
APPELLANTS

V.

GARY BORCHERT, SECOND INJURY
FUND and DEATH & PERMANENT
TOTAL DISABILITY TRUST FUND,
APPELLEES

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION,
[NO. F404328]

AFFIRMED

SAM BIRD, Judge

Mercy Health Center and its insurer AIG Claim Services, Inc., appeal from a decision of the Workers' Compensation Commission awarding additional benefits to claimant Gary Borchert for loss in wage-earning capacity. They contend that substantial evidence does not exist to support the Commission's finding that Borchert suffered a loss in wage-earning capacity in an amount equal to sixty percent to the body as a whole as a result of his compensable injury or its finding that the Second Injury Fund is not liable for the payment of benefits attributable to Borchert's loss in wage-earning capacity. We hold that the Commission's findings are supported by substantial evidence, and we affirm the Commission's decision.

Where the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the findings of the Commission and affirm if those findings are

supported by substantial evidence. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* We recognize that it is the Commission's function to determine the credibility of the witnesses and the weight to be given their testimony. *Powers v. City of Fayetteville*, 97 Ark. App. 251, 248 S.W.3d 516 (2007).

On December 3, 2002, Borchert, then fifty-four years old, suffered an admittedly compensable injury to his back while working as a delivery man for Mercy Health Center. To treat this injury, Dr. Regan Gallaher, a neurosurgeon, performed surgical procedures on Borchert's lower back on March 4, 2004; July 6, 2004; and December 9, 2004. The evidence indicates that Dr. Gallaher released Borchert from his care in September 2005.

At the request of Mercy Health Center, Borchert was then seen by Dr. J. Michael Calhoun, a neurosurgeon. In a report dated March 22, 2006, Dr. Calhoun stated that Borchert had reached maximum medical improvement and assigned him a permanent physical impairment rating in an amount equal to fourteen percent to the body as a whole. Dr. Calhoun also stated in his report that he did not think Borchert "would ever return to gainful employment." Mercy accepted and paid permanent partial disability benefits in accordance with this impairment rating.

At the request of his attorney, Borchert was evaluated by Sarah Moore, a vocational consultant. She drafted a report and testified at the hearing before the administrative law judge, opining that Borchert would not be able to return to gainful employment. She based this opinion in large part upon Borchert's statement to her that he must lie down for thirty

minutes to one hour several times a day and that he would miss four or five days each month because of back pain. Finally, at the request of Mercy Health Center, Borchert was evaluated by Edie Nichols, a vocational rehabilitation counselor. Nichols ordered a functional capacities evaluation, which indicated that Borchert was capable of performing work in the light category over the course of an eight-hour day.

At the hearing before the law judge, Borchert contended that he was permanently totally disabled as a result of his compensable injury. Appellants had already accepted and were paying benefits based on a fourteen-percent impairment rating, but they argued at the hearing that Borchert was not entitled to any permanent benefits in excess of the impairment rating. They also argued that, if Borchert was entitled to any additional benefits, the Second Injury Fund should pay.

The law judge found that Borchert failed to prove by a preponderance of the evidence that he was permanently totally disabled. However, the law judge did find that Borchert had suffered a loss in wage-earning capacity in an amount equal to sixty percent to the body as a whole as a result of his compensable injury. The law judge also found that appellants failed to prove by a preponderance of the evidence that the Second Injury Fund was liable for payment of compensation benefits attributable to Borchert's loss in wage-earning capacity. On appeal, the Commission affirmed the findings of the law judge and adopted his opinion as the decision of the Commission.

Wage-Loss Capacity

Appellants' first point on appeal is that substantial evidence does not exist to support

the Commission's finding that Borchert is entitled to wage-loss disability in the amount of sixty percent to the body as a whole. Appellants argue that the functional capacity evaluation ordered by Edie Nichols showed that Borchert was capable of performing work in the light physical demand category over the course of an eight-hour day. Appellants claim that Borchert has a work history in sales, marketing, and broadcasting, which are light-duty jobs. Further, appellants contend that Borchert testified that he could make more money starting a video-editing business than he made working for Mercy. Finally, appellants contend that Edie Nichols made Borchert aware of at least sixty-nine possible job openings that Borchert failed to pursue. They cite Ark. Code Ann. § 11-9-505(b)(3) (Repl. 2002), which provides that "no employee who waives rehabilitation or refuses to participate or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings."

On appeal, we review the evidence in the light most favorable to the findings of the Commission. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005). We will not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000). Questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. *Id.*

A worker who sustains an injury to the body as a whole may be entitled to wage-loss

disability in addition to his anatomical loss. See, e.g., *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000). However, objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage-loss disability. *Ark. Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993). In determining whether a claimant is entitled to benefits for loss of wage-earning capacity, the Commission may take into account such factors as "the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity." Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002). The Commission may also consider motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Henson v. Gen. Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007).

The Commission noted that Borchert had a high school education and a significant work history. He served in the military for five and one-half years, where he was in the security police and was also trained in the American Forces Radio and Television. He then worked in broadcasting and commercial radio as a disc jockey and a program director for twenty-seven years. For a short time after this, Borchert worked in the insurance business and

eventually started his own business, GDS Enterprises, in which he raised, showed, and bred horses and sold and built modular barns. Finally, Borchert worked for Mercy Health Center as a courier, transporting equipment and supplies between Mercy's various medical clinics.

However, Borchert testified that he used a cane when walking to help take weight off of his back. He also testified that he had to recline or lie down three to four times a day for thirty minutes to one hour and that three to four times per month he stayed in bed all day. He said that standing put weight on his back and caused numbing in his left foot and that he had to get up and move around after he sat for an hour or two but that he could walk for only ten to twenty minutes at a time.

Borchert's wife confirmed Borchert's testimony that he was unable to sit or stand for long periods of time. She also testified that he reclined several times a day for forty-five minutes or longer, depending upon his pain level, and that he reclined all day about once a week. She testified that his pain prevented him from helping with housework and that he often needed her help with showering and putting on his socks and shoes.

While the Commission noted that neither the report of Dr. Gallaher nor of Dr. Calhoun contained specific physical limitations, the Commission recognized Dr. Calhoun's statement that he did not think Borchert would ever return to gainful employment. The Commission also recognized Sarah Moore's opinion that Borchert was not capable of gainful employment and the opinion of Edward Johnson, an employee of the Arkansas Department of Work Force Services, that he knew of no jobs Borchert could perform given the restrictions of having to recline several times per day and not being able to work four or five

days per month. The Commission contrasted this testimony with the functional capacities evaluation indicating that Borchert was capable of performing light physical work over the course of an eight-hour day, noting that there was no indication that the evaluation considered Borchert's statement that he must recline for thirty minutes to one hour several times a day or that he must miss work four or five times per month. After considering all of this testimony, the Commission found that Borchert was not permanently and totally disabled but that he had suffered a loss in wage-earning capacity in an amount equal to sixty percent to the body as a whole.

The Commission rejected appellants' argument that Borchert failed to cooperate with an offered program of rehabilitation or job-placement assistance. The Commission recognized Borchert's effort to perform video-editing at home, which he was unable to do because of the need for expensive equipment for which appellants would not agree to pay. The Commission also remarked that, while Ms. Nichols did inform Borchert of various job openings in the light-duty category, at that time, Borchert had already been seen by Sarah Moore, who indicated that Borchert was not capable of being employed. Further, the Commission noted that Borchert testified that he contacted some of the employers with the help of Edward Johnson, an employee of Arkansas Department of Work Force Services, and that he contacted some employers on his own. Finally, the Commission noted Ms. Nichols's admission that she did not know how much effort Borchert put into looking for work and that he did inform her that he had been looking for work on his own. After reviewing this evidence, the Commission found that appellants failed to prove by a preponderance of the evidence that

Borchert failed to cooperate or participate in job-placement assistance.

Particularly in light of the fact that it is the Commission's function to determine the credibility of the witnesses and the weight to be given their testimony, we hold that the Commission's finding that Borchert is entitled to wage-loss disability is supported by substantial evidence.

Second Injury Fund Liability

Appellants' second point on appeal is that substantial evidence does not exist to support the Commission's decision that the Second Injury Fund has no liability. Specifically, appellants contend that Borchert's wage loss was attributable to pre-existing injuries and not to the compensable injury. Accordingly, they argue that the Second Injury Fund is liable for the additional benefits awarded in excess of Borchert's permanent physical impairment rating. In *Mid-South Construction Co. v. Second Injury Fund*, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (1988), the supreme court set forth the following three elements that must be shown for the Second Injury Fund to have liability: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

The Commission found that, even if the first two elements of the supreme court's test had been satisfied, appellants failed to prove that Borchert's pre-existing impairment combined with his most recent compensable injury to produce his current disability status. The Commission found specifically that Borchert's loss in wage-earning capacity was attributable

to his most recent low-back injury.

The Commission recognized several of Borchert's pre-existing medical conditions, including bacterial endocarditis in 1979; a heart-valve replacement in 1995, for which he still takes medication; and surgery on his right knee in the 1980s for a torn ligament. However, the Commission also noted that, in spite of these conditions, Borchert testified that before the most recent injury he was very active working in the yard, hunting, fishing, training and showing horses, and bowling several times a week with no problems. His wife's testimony confirmed that Borchert was very active. Moreover, the Commission acknowledged that the majority of limitations provided for in the functional capacities evaluation involved limitations caused by Borchert's compensable back injury, not his prior medical conditions. The only prior medical condition addressed in the evaluation involved his inability to crouch due to the prior knee injury, which, the Commission remarked, did not appear to significantly impact Borchert's ability to return to work.

We hold that the Commission's finding that Borchert's loss in wage-earning capacity was due to his most recent injury rather than a combination of his back injury and his pre-existing injuries is supported by substantial evidence, and we affirm the Commission's decision finding that the Second Injury Fund is not liable for payment of benefits.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.